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MMC ENGINEERING GROUP BHD v. MD GHAZALI ALI

COURT OF APPEAL, PUTRAJAYA
AZMI ARIFFIN JCA
MOHD FIRUZ JAFFRIL JCA
ONG CHEE KWAN JCA
B [CONSTRUCTION APPEAL NO: J-01(A)-68-01-2024]
5 NOVEMBER 2025

Abstract – *An employee's action, even if found to be ill-advised or mistaken, will generally not constitute misconduct sufficient to warrant termination if the employee acted bona fide and solely for the purpose of improving the company's performance in the scope of their duties, especially when: (i) the action lacked malicious elements, dishonesty, recklessness, or a motive of self-interest; (ii) the employee's superior or the relevant department was consulted, informed or approved the action, demonstrating that it was not a unilateral act; and (iii) the contents of the communication/document are in line with the company's operational expectations and the employee's duties.*

ADMINISTRATIVE LAW: *Judicial review – Appeal – Challenge against award of Industrial Court – Award quashed by High Court – Claimant dismissed from employment – Allegations that claimant directed issuance of document to employees, using and quoting Chief Operating Officer without obtaining prior approval – Document allegedly placed employees under duress and concerned continuity of their employment – Whether allegations proven – Whether claimant acted bona fide – Whether claimant's action amounted to misconduct – Whether punishment of dismissal proportionate – Whether award of Industrial Court tainted with error of law – Whether High Court correct in allowing judicial review and quashing award*

LABOUR LAW: *Employment – Termination – Misconduct – Allegations that claimant directed issuance of document to employees, using and quoting Chief Operating Officer without obtaining prior approval – Claimant dismissed from employment – Whether allegations proven – Whether claimant's action amounted to misconduct – Whether punishment of dismissal proportionate to alleged misconduct*

The respondent was employed by the appellant as General Manager for projects, under a fixed term contract. He was later seconded to MMC Pembetungan Langat Sdn Bhd ('MMCPL') as Head Sewerage Conveyance System to work on the Langat Sewerage Project ('SCS'). In his capacity as the Head of SCS, the respondent could recommend the renewal or extension of the fixed-term ('FT') contracts of the operations staff. The respondent had drafted a document titled 'Network Operation – Staff Commitment to Project Completion' ('commitment declaration'), which required the signatories to

agree that the team's poor detail planning, monitoring, and supervision – compounded by over-reliance on subcontractors and insufficient focus on issue resolution – had created an unhealthy culture leading to a major project crisis and significant delays. The commitment declaration was distributed by the appellant's Human Resources Manager ('COW5') to the FT Operations staff in a townhall meeting, while the respondent was on leave, and they were informed that if they did not agree to the commitment declaration, there was a possibility that their fixed-term contracts would not be extended. This caused dissatisfaction amongst the FT Operations staff and the matter was brought to the attention of the appellant's Human Resources Department. The appellant issued a show cause letter, levelling three allegations against the respondent, namely for: (i) directing the issuance of the commitment declaration to the FT Operations staff, placing them under duress and giving them no option but to agree with the contents of the document for the continuity of their employment; (ii) using and quoting the Chief Operating Officer ('COO') in the statement of the document – an action constituting misrepresentation to the employees whereby it may be construed that the COO agreed with the action and the issuance of such document when, in reality, he was not consulted on the matter; and (iii) using and quoting the COO in the statement of the document without consulting or obtaining prior approval from the COO, thereby affecting the reputation of the COO as he did not authorise the statement or contents of the documents. The respondent replied to the show cause letter but the appellant found his response to be unacceptable and proceeded to terminate the respondent's services. The dispute was ventilated at the Industrial Court. The Industrial Court found in favour of the appellant. Dissatisfied, the respondent filed an application for judicial review at the High Court which, *inter alia*, quashed the decision of the Industrial Court. Hence, the present appeal by the appellant.

Held (dismissing appeal)
Per Azmi Ariffin JCA delivering the judgment of the court:

(1) The commitment declaration was merely a draft which was not finalised. The draft was referred to by the respondent to COW5 who then reviewed, approved and emailed it back to the respondent 'for immediate action'. The commitment declaration was already within the knowledge of the Human Resources Department and COW5 as the Head. In preparing and drafting the said document, the respondent had also consulted and had received feedback from the Deputy Project Director of MMCPL. In short, it was openly done by the respondent and not secretly done by him. The respondent had never, on his own accord silently issued and passed the commitment declaration to the employees and forced them to sign without anyone's knowledge. (paras 40-42)

(2) The issuance of the commitment declaration did not render the respondent's action a misconduct, since the document was not even finalised and the COO even agreed that the company could cancel the issuance of the commitment declaration. Hence, why did the appellant, imposed such a harsh punishment when the respondent's main aim was solely to improve the company's performance? (para 48)

(3) The drafting of the commitment declaration was solely aimed at improving the company's performance and the necessity for the timely completion of the project. The respondent had acted *bona fide* in the performance of his duties. The issuance of the commitment declaration, even if ill-advised or mistaken, could not amount to misconduct especially when it was not demonstrated that the respondent had acted recklessly or dishonestly or for his own self-interest. Furthermore, the commitment declaration contained no malicious elements or intent, nor did the appellant provide any evidence to prove such intent. The contents of the commitment declaration, taken as a whole, were in line with the COO's expectations and the respondent's duties. (paras 43 & 49)

(4) The distribution of the commitment declaration to the FT Operations staff took place while the respondent was on leave. Without his presence during the townhall sessions, how could the appellant have alleged that the act of the respondent had struck at the core of the employer-employee relationship and undermined the appellant's reputation. Such an assertion made against the respondent was in fact not supported at all by the evidence and was untenable. (para 50)

(5) The award of the Industrial Court was tainted with error of law. The High Court was correct in allowing the judicial review and quashing the award. (para 52)

Case(s) referred to:

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 20

For the appellant - Sivabalah Nadarajah, Reena Enbasegaram & Hua Zhi Loon; M/s Shearn Delamore & Co

For the respondent - Izzat Muhtar & Zaimil Hasra Zainal; M/s Izzat Muhtar & Hasra

[Editor's note: For the High Court judgment, please see Md Ghazali Ali v. Mahkamah Perusahaan Malaysia & Satu Lagi [2024] CLJU 3222 (affirmed).]

Reported by Lina E

JUDGMENT

Azmi Ariffin JCA:

Introduction

[1] Enclosure 22 dated 15 January 2024 is the appellant's notice of appeal to this court against the Johor Bahru High Court's decision given on 9 January 2024 where the High Court had overturned the Award No. 1688 of 2022 of the Industrial Court, dismissing the respondent's claim of unfair dismissal in favour of the respondent.

Backgrounds Facts

[2] The respondent was employed by the appellant as General Manager for projects under a fixed-term contract dated 3 August 2016 for a duration of two years, with any renewal of the said contract being subject to the respondent's performance.

[3] On 21 December 2016, the respondent was seconded to MMC Pembetungan Langat Sdn Bhd as Head Sewerage Conveyance System to work on the Langat Sewerage Project (hereinafter referred to as the "SCS").

[4] In his capacity as head of SCS, the respondent could recommend the renewal or extension of the fixed term (hereinafter referred to as "FT") operations staff's contracts.

[5] The respondent personally drafted a document titled "Network Operation – Staff Commitment to Project Completion" (hereinafter referred to as the "commitment declaration") and issued it to the FT Operations staff.

[6] For ease of reference, a copy of the "commitment declaration" is reproduced herein:

> Network Operation-staff Commitment To Project Completion
>
> I, ... whom currently working at Cadangan Pembinaan Langat Centralised Sewage Treatment Plant (CSTP) Dan Penyambungan Rangkaian Paip Pembetungan Di Kawasan Tadahan Lembangan Sungai Langat Secara Reka dan Bina Project under Network Operation Team (SCS) is fully aware that currently the Project is suffering severe delay.
>
> I am aware that since the early stage of the Project, the team is lacking on conducting day-to-day detail planning, monitoring and supervision, less focus on addressing issues, too depending on subcontractors that cause the Project to delay. I am also aware that the project is facing a big crisis to complete the work on time. As part of the team members, I realize that this "urrent culture" is unhealthy and could cause further delay to the project should we still be at this comfort zone.
>
> In line with the directive given by our COO to make sure that the team should wake up and focus in our work ensuring that the Project could be completed on time or to the desired contractual completion date, the team

should change our way of working by putting more effort to the Project completion and do all necessary including to become more efficient for the benefit of the company.

I also confirmed that I am ready to adopt the changes and strike for the best working practices which is recently being implemented. I will contribute my level best to the company by efficiently doing the works under my scope including the following;

(a) Be more responsible in delivering my job scopes;

(b) Timely addressing and highlighting all issues related to my work to my superior with proposed action plans;

(c) Timely submitting the necessary deliverables under my scope, including but not limited to JMS, RFI, 2 Weeks and 2 Monthly looks ahead;

(d) Monitoring subcontractors' performance based on timely delivery of machineries, manpower and necessary resources;

(e) To conduct weekly progress meeting with all subcontractors and addressing all potential and current issues for solution; To ensure that all works to be carried by subcontractors are as per plan and do the necessary to prevent delay to the project;

(f) Always ready and responsible to complete any necessary tasks given by the superior;

(g) To participate in daily discussion with the superior from 4.30pm at Site Office to 5.30pm to discuss and close on "day to day work achievement or failure" and to provide daily "Tomorrow work plan or mitigation plan";

(h) To assist the other operation team members for the preparation of any reports, presentation and any submission on timely manner.

(i) To execute all instruction on work related given by the superior.

I have read, understand and fully aware of all the above commitments stated herein, therefore (click where applicable):

( ) I AGREE to perform all the above commitments and shall give my best possible effort for the Project completion.

( ) I DISAGREE to perform all the above commitments as set by the company.

Signed by:	Witnessed by (1):
…	...
Name …	Name …
Date …	Date …

[7] The commitment declaration required the signatories to agree that, "I am aware that since the early stage of the project, the team is lacking on conducting day-to-day detail planning, monitoring and supervision, less focus on addressing issues, too depending on subcontractors that cause the project to delay. I am also aware that the project is facing a big crisis to complete the work on time. As part of the team members, I realise that this "current culture" is unhealthy and could cause further delay to the project should we still be at this comfort zone".

[8] The said commitment declaration further contained ten items of commitment to be observed by the FT Operations staff and required them to indicate compliance by selecting either one of the prescribed options:

> I have read, understand and fully aware of all the above commitments stated herein, therefore
>
> ( ) I AGREE to perform all the above commitments and shall give my best possible effort for the Project completion.
>
> ( ) I DISAGREE to perform all the above commitments as set by the company.

[9] The respondent's commitment declaration purported to rely on a directive issued by the Chief Operating Officer, Technical & Engineering, who at the material time was one Mohd Razin Ghazali ("COW2") (hereinafter referred to as the "COO").

[10] However, the COO did not know about the commitment declaration, nor did he issue any instructions for such a document.

[11] The respondent summoned one Azian bin Baharudin ("COW5") Human Resources and Administration Manager of MMC Pembetungan Langat Sdn Bhd, who was subordinate in position to him, to his room and handed him the commitment declaration. The respondent informed COW5 that he had personally drafted it the night before and intended to issue it to the FT Operations staff.

[12] He then instructed COW5 to check the commitment declaration despite the latter's reluctance to do so since the Human Resource Department was not issuing it. COW5 nonetheless complied with the respondent's instructions and reverted with his proposed grammatical revisions.

[13] The said COW5 cautioned the respondent that exerting such undue pressure upon the FT Operations staff could expose the respondent to potential claims of constructive dismissal/resignation by the appellant, which the respondent disregarded.

[14] Prior to 20 August 2018, the respondent informed about Zulkarnain bin Yaakub ("COW4"), the Deputy Project Director (also the superior of the said COW5) of the commitment declaration, which was still in draft form.

COW4 expressly advised the respondent to raise the matter with the Project Director, who the respondent's superior was. Notwithstanding the said advice, the respondent failed to do so.

[15] On 20 August 2018, *vide* an email, the respondent instructed COW5 to "[p]lease assist to get our zone engineers and CM to sign off prior to the extension of their contract as per our discussion. The extension of one-year contract (until October 2019) shall apply to those who have signed with the agreement on the commitment but to those with disagreement shall be "on kiv". I will discuss with En Fattah on our action plan for those on "kiv" once I am back to office".

[16] 'En Fatah' referred to therein was one Mohd Abdul Patah bin Endut ("COW3"), who the then acting Director, Project Operations. He also had no knowledge of or involvement with the commitment declaration.

[17] The respondent went on leave from 20 August 2018 until 24 August 2018.

[18] Pursuant to the respondent's aforesaid email, a townhall was convened on 20 August 2018. At the townhall, the said commitment declaration was distributed to the FT Operations staff.

[19] COW5 informed all the attendees during the said townhall that the commitment declaration was pursuant to the respondent's instruction and any queries should be referred to the respondent after his return from his leave.

[20] Consistent with the contents of the respondent's email dated 20 August 2018, the attendees were further informed that in the event they did not agree to the commitment declaration, there was a possibility that their fixed-term contracts would not be extended.

[21] During the said townhall, the attendees expressed their dissatisfaction with the commitment declaration and had to be calmed down. Their grievance over the commitment declaration was on the basis that it:

(i) sought to blame them for the delay in the completion of the on-going project(s);

(ii) compelled them to take responsibility for tasks that were outside their job scope of work and beyond their control;

(iii) compelled them to undertake tasks which were not logistically practical and would have adversely impacted their daily responsibilities and functions as site/zone engineers; and

(iv) compelled them to elect one of two alternatives, either to agree or disagree, relating to their commitments to the project completion.

[22] The matter was brought to the attention of the appellant's Human Resources Department.

[23] Pursuant thereto, the appellant issued a show cause letter dated 5 September 2018 levelling three allegations against the respondent, to which the appellant responded *vide* a letter dated 14 September 2018.

[24] For ease of reference, a copy of the show cause letter is reproduced herein:

> 5 September 2018
>
> Md Ghazali Ali
> General Manager, Projects
> MMC Engineering Group
>
> Dear Ghazali,
>
> Show Cause Letter
>
> It has been reported to us that between 18 August 2015 and 20 August 2015, you as General Manager, Projects, currently seconded to MMC Pembetungan Langat Sdn Bhd have allegedly committed the following misconduct (s):
>
> 1. Directed the issuance of a document "Network Operation – Staff Commitment to Project" to a group of employees working with the Company where they were told to sign that document in order for them to be considered for contract renewal or extension. Your action has placed the employees under duress and has given the employees no option but to agree with the content of the document for the continuity of their employment.
>
> 2. Used and quoted the "COO" (Chief Operations Officer) in the statement of the document. Your action constitutes a misrepresentation to the employees whereby it may be construed that the COO has agreed with your action and the issuance of such document where in reality he was not consulted on this matter.
>
> 3. Used and quoted the "COO" (Chief Operations Officer) in the statement of the document without consulting or obtaining prior approval from the COO. Your action has affected the reputation of the COO as he did not authorize the statements or content of the document.
>
> We request your written explanation to the above alleged misconduct(s) by Friday, 14 September 2018. If you fail to provide your explanation, the Company shall proceed with further investigation and inquiry if necessary.
>
> In view of the seriousness of the misconduct(s), the Company has decided to suspend you pending further investigation until further notice from the Company. The first two (2) weeks of your suspension shall be on half pay. Any suspension longer than two (2) weeks shall be on full

pay. If the result of the investigation or inquiry does not disclose a case against you, the Company shall forthwith restore to you the full amount of pay withheld. During this period of suspension, you must make yourself available to assist the Company in its investigation when required.

Please acknowledged receipt of this letter by signing and returning the attached duplicate copy to the undersigned.

Yours faithfully,

MMC Engineering Group Berhad
Noorazam Abbas

[25] The respondent through a letter dated 14 September 2019 replied to the said show cause letter. The respondent had answered the said allegations of misconduct *via* a letter dated 14 September 2018, which is reproduced as follows:

To:

Head, Group Human Resources MMC Engineering Group Berhad

Attn: Noorazam Abbas

14th September 2018

Re: Reply To Show Cause Letter

I refer to a "Show Cause Letter" from MMC issued to me by Head of Group Human Resource on 5th Sept. 2018 with the allegation of misconducts on issue pertaining to "Network Operation – Staff Commitment to Project Completion" (SCPC) between 18th to 20th August 2018 which are as follows:

1. Directed the issuance of document (SCPC):
2. Used and quoted the COO in the statement of the said SCPC document;
3. Used and quoted the COO in the statement of the said SCPC document without obtaining prior approval from the COO.

I would like to put on record on the meeting held before the issuance of the above show cause letter to me on 29th August between En Mohd Razin Ghazali (COO), En Mohd Abdul Fatah (CEO), Noorazam (your goodself/Head, Group HR) and me pertaining to the same matter. During this meeting, you have explained to me MMC's opinion on the consequences of the issuance of SCPC document (currently being translated into your Show Cause letter to me – (Refer to Appendix 1 – - Show Cause Letter) and requested me to explain on the situation. I have then informed the meeting that the status of work at site is at crisis and requires full commitment from all levels, particularly the operation staff. The staff commitment issue has been handled at site level with Project Director (PD) and Deputy Project Director (DPD) but nothing has been done until I brought up the issue to En. Mohd Abdul Fatah on July 2018.

There are some pertinent notes to be read to better understand the issue, there are:

(a) Status of Work – Langat Sewer Network MMCPLSB

The project that we are currently undertaking is at "Crucial and Critical". Below is the status of the project;

Currently the Sewer Network Project which we are undertaking is facing severe delay for approximately 380 days. The contract completion for the network under Phase 1 completion to receive first flow was on 12 April 2018 and subsequently to carry out liquid test for a period of 6 months to meet the Certificate of Sectional Completion No. 1 (CSC1), *ie*, 11 October 2018. Till to date there are still lots of outstanding works and we further anticipate completing the work to have the first flow sometime on July 2019, provided that stringent close monitoring and control be implemented on site. Further, to enable the project to provide first flow on July 2019, Extension of Time (EOT) No. 3 which is currently being reviewed by the client shall be granted, otherwise the company will be charged with Liquid Ascertain Damages (LAD) amounting to RM100,000 per day.

Being a professional and involved in the construction industries for more than 30 years since year 1987, I have seen that this project is at "Crisis" and the only way to recover is to implement the right method of project monitoring and control with the implementation of "Project Management Practices" to this project.

Current practices;

Since the beginning of the project, the progress of works was so much depending on the capacity of all subcontractors under MIMCPLSB and we are lacking on "close monitoring and control". Many times, the delay from subcontractors would not be resolved by having the mitigation or recovery from subcontractors' side.

(b) COO vision/tasks to ensure completion

Ever since MIMC appointed the COO in last February 2018, I have started to see the light at the other end of the tunnel as the new COO envisioned some good approaches to tackle all issues on site for completing the work in timely manner. This is definitely, in line with what I have been doing in the past to this project but was unable to continue the approach due to many reasons among others, the readiness and commitment from staff. Since that February 2018, I have had the feeling that MMC could be able to deliver the project with the direct involvement from top management, *ie*, COO. I see that this new direction is with the hope to change the "existing culture" by implementing the appropriate "good working practices" including "close monitoring and control" at project level.

But these approaches require big effort from the management side. Management should first realize some of the following pertinent points;

(i) Out of so many projects that MMC are undertaking, none of the project was being carried out directly under MMC project team. It was either on "IV" basis or on "Total Sub-contract" basis. Even though for works on "JV", MMC capacity was merely on back-up staffing whilst the one running the show was the other JV Partner. Some good examples are MRT Line 1, MRT Line 2, PAN Borneo, *etc*. Due to this factor, we MMC are currently facing fundamental issue, the fact that we do not have solid team to run the project on our own, particularly those projects on big scale.

(ii) MMC is also aware that the current project namely Langat Sewer (this project) awarded to MMC under MIMCPLSB with the project value of 1.5 billion is somehow the first project that the management has decided to run and manage on our own for the first time. Whilst we, *ie*, the company notices that there were lots of hiccups and delay which occur during the implementation of the project due to many reasons, *ie*, internal and external factors, that internal factors include;

(a) "difficulties in getting the solid team to work as the staff were being engaged from outside the company for the purpose of carrying out the said project";

(b) "difficulties in implementing the correct approach as first timer to monitor the progress of works carried out by our subcontractors";

(c) "difficulties in managing the change management – change their previous work method of working as the staff have been with the 'culture of work' since the Incorporation of MMCPLSB last three (3) years";

(d) "difficulties in giving the right direction to staff on certain degrees of commitment required from staff for the purpose of completing the project;"

(e) "difficulties in bringing the staff to appreciate the company's "5 Core values", *etc*, and the above factors have become several major issues to MMC particularly at project level and could prevent MMC to achieve company objectives, *ie*, to complete the project in timely manner and to be a respectable contractor in the eyes of Malaysian.

The Team – Network

It is no secret that to run the big scale project on our own for the first time, it was a tough call from the management and the company has no other choices but to pick, shop and choose the staff from "fish market" hoping for the best. Should the company be at better fate, the shopping will be to all good fishes, however if it is otherwise, we may be getting those rotten fishes.

This is, what is happening on project level. We are currently facing lots of issues including issue on gaining solid commitment from staff whilst everyone should admit that the first thing to tackle "project crisis" is to ensure solid commitment from staff.

Whilst I was given the tasks to Head the Network team at project level, I have taken all the necessary steps including coaching and necessary advice to my subordinates at the project level. Apart from that, I have also addressed the commitment issue to Company HR, Project Director and Deputy Project Director, and reporting the same to CEO, En. Mohd Abdul Fatah. Details of it has been elaborated when I sent an email to my COO, c.c. to Dato' Sri GMD. (Refer to my email to COO dated 2nd September 2018 as per the Appendix 2 – Email to COO).

Knowing the fact on the "crisis" become the major contribution to the project delay and some of the root-causes were due to the staff commitment and their method of monitoring the progress, I have requested my team to conduct daily discussion from 4.30pm to 5.30pm, mainly to carry out "micro-monitoring", *ie*, to discuss on whether all works are executed as per our plan, to plan for work to be carried out on the next day and action plan to be carried out to overcome or mitigate those delay occurred for the day, so that the project could be managed smoothly.

However, this so called "simple direction" which is actually part of common Project Management Practices under the project Monitoring and control, especially to tackle current crisis was being misled and became a big issue to staff since this approach will take up some of their times. During several discussions with the team/staff with the presence of PD and DPD, and sometime with Head of HR, staff informed the meetings that their working time will only be from 8am to 5pm and they have also informed that they are unable to stay back after 5pm due to their other commitment, *ie*, family commitment. This was one of the reasons that I urged the management to assist in resolving our internal problem, *ie*, staff commitment issue, and again for the benefit of the project.

(c) The issue of staff commitment is becoming very serious and requires top management's attention

As I have explained during the meeting on 29th August 2018 and further explanation in my email to COO on 2nd September 2018, I have raised the issue up to the top management, *ie*, En. Mohd Abdul Fatah for necessary action. But the facts have somehow being manipulated from those whom really feel "insecure" and ended up with me being the victim. (Kindly refer to my email to COO as per attachment).

I would also like to put on record on the meeting held on 29th August 2018 above. Note that the decision to make an allegation against me and put me to resign from the company may have the element of mistreatment and prejudice before calling or investigating the real issue. The company has taken those complaints from staff at the project including email from staff to Dato' Sri as final at the time during my 1-week vacation. I was on a week vacation from 20th to 24th August 2018. Prior my vacation, I have also put up a long list of Tasks Distribution and Issues During My Absence – *ie*, Actions to Be taken by my subordinates to ensure that we are in control of the project. (Please refer to my notes as per my email on 18th August 2018 as per Appendix 3).

During the meeting on 29th August 2018, it was also informed and concluded that even though the company was fully aware on my commendable performance in delivering my job and there was no dispute on my performance but, the allegation is purely on the idea on issuing the SCPC to some staff prior the extension of their contract which was claimed as serious "misconduct" from my side.

I have explained in detail the reason on why I have raised up the idea of issuing SCPC, only after going through and highlighted the issue of this staff commitment to all levels including the assistance from En. Mohd Abdul Fatah (CEO), where the issue has then been brought up by him to Hasbullah, Head of HR MMCE was then brought up to the Group HR. Please also note that during the discussion with En. Fatah, and his concerns about current project status is at critical level, he has requested me and the site management not to extend the employment contract for those staff that are not committed to their work. Apart from that, it was also a concern from MMCPLSB HR to extend the staff contract since some employment contracts are due for expiry. I have also explained that the idea was made with a discussion with DPD and Head HR of MMCPLSB, then only I drafted the document. It was all with the good intention to enable the project to achieve timely completion.

Please also note that in my email to Azian on 20 August 2018, it was crystal clear that I have suggested to Azian that extension of their contract should be done immediately to those who sign the SCPC, whilst to those who are not willing to sign, a further discussion to discuss the matter will take place between En. Fatah and me. This is again, shows that I was telling Azian that I was not in a capacity to act on my own but require final decision from top management on issue pertaining to staff commitment and their extension of contract. (Please refer to my email to Azian as per Appendix 4).

In my email to COO on 2nd September 2018, I have also explained the proposed step to be taken by HR Department in handling the issue of staff commitment. In short, in early July 2018 my two (2) Construction Manager, Zahabuddin and Abdullah have complained to me that they were having problem in handling some of zone engineers. Both Zahabuddin and Abdullah have then identified and informed me that there was one zone engineer whom was so difficult to handle (I will name him as Engineer H) and was quite influential to the rest of the zone engineers. As the issue was unable to be resolved at project level, and after due consultation with En. Mohd Abdul Fatah, our HR MMCPLSB and HR MMCE have taken a step to issue a show cause letter with two (2) weeks suspension to this "Engineer H". The proposal has been brought up to me by HR but during the tele-conversation with Head, Group HR, I have highlighted to him that the proposal for issuing show cause letter with 2 weeks suspension to "Engineer H" could trigger potential constructive dismissal. With all due consideration, I have requested our HR to consider the consultation to be given to this "Engineer H" and to monitor his progress prior taking such action, and

the consultation took place sometime early August 2018 between Azian HR MMCPLAB, "Engineer H" and me. I have then requested Zahabuddin and Abdullah to monitor "Engineer H". To my surprise, during my vacation, I was told that there was a complaint lodged to our Dato' Sri GMD between 21 to 22 August 2018, after the SCPC being given to the staff, and the one who wrote an email to Dato' Sri GMD was this "Engineer H".

Allegation 1

Misconduct due to – Directed the issuance of document "Network Operation – Staff Commitment to Project Completion" (SCPC); The allegation on the misconduct was about – Directed the issuance of SCPC document. In order to justify such allegation, one should see whether there is any element of "Directed" as the document was issued after due consultation with DPD and Head HR, MIMCPLSB?

(a) Roles of Deputy Project Director (DPD) and Head of HR, MIMC PLSB

(i) Roles of Deputy Project Director (DPD), MIMC PLSB

As highlighted earlier, there was due consultation and discussion between Mid Ghazali and DPD prior issuance of SCPC document to the respective staff. It is becoming crucial to highlight that DPD has neither advised nor stopped the release of such document.

Should the document be seen to be harmful and has the impact to the company, DPD should play his roles and advice for not issuing the document.

(ii) Roles of Head HR, MMC PLSB

As highlighted earlier, there was also due consultation and discussion between Md Ghazali and Head of HR, MMCPLSB prior issuance of SCPC document to the respective staff. (In the MMCPLSB Organization Chart, Head of HR, MMSPLSB is reporting directly to DPD). Further, he has reviewed the document, amended and issued the document to the respective staff. It is becoming crucial to highlight on the roles of Head of HR as he has never advised nor stop the release of such document. Should the document be seen to be harmful and has the impact to the company and would cause any misconduct, Head of HR should again play his roles and advice for not issuing the document instead of amending the document. (Please refer to the email conversation between Head of HR, PLSB and me as per Attachment No. 5 where the SCPC has been amended and edited by Azian).

With all the above explanations, there was neither an element of "Directed" nor "Instruction" from me as the idea of the document has been shared, reviewed and edited by the right persons having the right authority and was not for anything else but with the good intention and for the benefit to the company. It was further explained that the document has been discussed with due consultation from both Senior Managements, *ie*, DPD and Head of HR, MIMCPLSB.

(b) Is the SCPC harmful and has the bad impact to the company?

Looking from another angle, if MMC takes that such SCPC document is harmful and has the bad impact to the company and would treat it as misconduct, the company should not only issue the allegation solely to Md Ghazali but should also issue the same to both Major Zulkarnain as DPD and Azian as Head HR, MMCPLSB. I really feel that if such allegation be given only to me and not the other two (2) as mentioned above, it has caused prejudice and injustice to me.

(c) Findings

Whilst only Md Ghazali has currently been penalized and not the other two, it is become evidence that SCPC document does not really matter to the company. Thus, the burden of proof rested on the company to give reason on why till to date, the above two management staff namely the DPD and Head of HR, MMCPLSB are still free and not being penalized by giving the same show cause letters and two (2) weeks suspension like me.

Allegation 2

Misconduct – Used and quoted the "COO" in the statement of the said SCD document

Let us investigate the above allegation – "Used and quoted COO in the statement ...". The use of COO is with the following facts;

(a) What transpired during several discussions and meetings with COO.

(i) During several discussions and meetings, COO has expressed his concern on this Langat Sewer project and wants all the team to put serious effort and commitment to ensure the timely completion of the project. This shows a good sign and is actually one of his roles for being the Chief Operation Officer in the company. He also highlighted that all staff should put extra mileage to make things to happen.

(ii) With his good intention to ensure timely completion, COO has called for Weekly Project Issues Meeting with Langat Sewer Project – Network team, to discuss on "Balance of Works for Completion and Issues to be Resolved", a very good Project Management Practices ensuring that all critical issues are being addressed with several action plans for solution. These meeting have been carried out continuously on weekly basis since the last two (2) months.

(iii) In late July 2018, also during the Project Issues Meeting, there was something that our team was unable to update the necessary information required by COO, ended up I was cursed by him with the statement "... F^@# You, Ghazali ...". The event took place in front the team members including two ladies. Whilst I still could take it as "acceptable" and fully understand that even though it was my subordinates that was unable to update such information, we can see that the COO has clear direction to complete the job on timely basis under the correct manners and approaches. Further, I was still the person whom is accountable to it and

took it as part and parcel of the work. In the afternoon on the same day after the event, I have called all my team and shared with them such clear direction from our COO and really requested the team to be more committed in the job as I alone could not shoulder such burden.

(b) Is the use of "COO" inside SCPC document created misrepresentation as claimed by the company?

Note that the use of the word "COO" is with no other purposes but to provide the clear picture of the company's direction and to show to the team/staff on how serious that all team members to handle the situation. It is merely with the good intention to achieve one of the company goals, *ie*, to make sure that all staff are serious in carrying out their work to complete the project in timely manner. Added up with the facts given in item Allegation 2(a) above, it is obvious that there isn't any element of misrepresentation as claimed by the company.

Unless, the COO himself has no intention to make sure that those projects under him be completed in timely manner and do not want to implement the project as per the standard Project Management Practices, which I have great doubt on these subjects, there should be no element of misrepresentation to this case.

Based on my personal experience, I have also seen many times in many construction companies that their top management have advised to quote their name for the seek of getting the job done and it was proven based on the success of the projects.

(c) Findings

To conclude, I may guess that the company may have been shocked at the moment that Ron has put up complaint to the management and painted all black about me and followed up with the notes being issued to Dato' Sri GMD by one of the engineers, that make up the complot be seen as factual.

Kindly note that Allegation 3 is merely an extension of Allegation 2 and full explanation being given in Allegation 2 serve as respond to Allegation 3 as well. I believe with all the above explanation; this issue would be settled wisely by the management by reviewing and looking on the fundamental and the root-causes of the issue. I would also like to reiterate that staff commitment is fundamental to the success of the project particularly when project is at "crisis".

Let also investigate the way how other construction companies in Malaysia can manage their mega projects where the element of staff commitment is becoming a "key factor" to the success of their projects.

If we go further and investigate the way how Korean and Japanese be so committed while managing their projects, we will be surprised to see them treating that the 1 or two (2) days delay in their project as critical. I may share my experience working with Japanese where the monitoring of progress is even at hourly basis. Any work which may anticipate any potential delay will then be resolved on the same day, with the role of Construction Manager to propose mitigation plan at 5pm to Planning Head of the project.

A Whilst our Langat Sewer Project has encountered delay even more than a year, we should be more serious in handling this issue and to tackle the root causes of the delay for the benefit of the company.

Yours truly,

Md Ghazali Bin Ali
B (General Manager, Projects)
HP:+6012-503 6242

[26] The appellant found the respondent's response unacceptable. As the appellant could no longer repose the necessary trust and confidence to maintain the respondent in its employment, the appellant issued a
C "withdrawal of contract extension" to the respondent dated 1 October 2018, and the respondent's services were terminated with effect from 3 October 2018.

Industrial Court

D **[27]** Dissatisfied with the termination, the respondent made representations for reinstatement pursuant to s. 20 of the Industrial Relations Act 1967 within the prescribed 60 days of his dismissal, which was thereafter referred to the Industrial Court by the Honourable Minister of Human Resources for adjudication. The dispute was ventilated before the Industrial Court. During
E the proceedings, the appellant's witnesses included Mohd Razin Ghazali, COO (COW2), Mohd Abdul Patah bin Endut (COW3), Zulkarnain bin Yaakub (COW4), Azian (COW5) and Fadzillah Mohammad Isa (COW6) a site supervisor who attended the townhall in question.

[28] On 1 January 2022, the Industrial Court found in favour of the
F appellant and concluded as follows:

[64] Berdasarkan keterangan saksi-saksi syarikat, mahkamah mendapati bahawa Penuntut telah melakukan salah laku yang serius dan ini menyebabkan pihak syarikat tidak lagi menaruh kepercayaan dan keyakinan terhadap Penuntut untuk meneruskan perkhidmatannya
G dengan syarikat. Akibat daripada salah laku yang serius ini syarikat tidak mempunyai pilihan lain selain dari mengambil tindakan untuk memberhentikan Penuntut dari perkhidmatannya.

…

[101] Mahkamah mendapati bahawa pihak syarikat telah membuktikan
H kesnya terhadap Penuntut atas imbangan kebarangkalian. Setelah membuat penilaian terhadap keseluruhan keterangan yang dikemukakan, sebagai mahkamah yang bertindak mengikut ekuiti, perasaan nurani dan merit teguh kes ini dan tanpa mengambilkira perkara teknikal, diputuskan bahawa pemberhentian Penuntut oleh pihak syarikat adalah dengan bersebab dan dengan alasan yang wajar.

I [102] Oleh yang demikian, tuntutan Penuntut dengan ini ditolak.

[29] Dissatisfied with the said decision, the respondent filed an application for judicial review at the High Court which, *inter alia*, quashed the decision of the Industrial Court.

[30] The appellant is now appealing against the decision of the High Court and for the reinstatement of the Award No. 1688 of 2022 of the Industrial Court.

High Court's Decision

[31] The High Court was satisfied that the Industrial Court had committed errors of law which vitiated the awards. The High Court's analysis of the facts and the applicable law and the reasons for allowing the application for judicial review may be gleaned from the following parts of the grounds of judgment, which read as follows:

> [52] Setelah meneliti rekod-rekod prosiding R1 secara keseluruhan, Mahkamah ini berpuashati untuk memutuskan bahawa dapatan R1 bahawa R2 telah berjaya membuktikan salah laku P dalam ketiga-tiga pertuduhan-pertuduhan yang dirangka adalah dapatan-dapatan yang tidak munsabah atau perverse. Selain itu, Mahkamah ini juga mendapati bahawa R1 telah gagal mempertimbangkan prinsip perkadaran (proportionality) dalam hukuman yang dikenakan oleh atas P. Akhir sekali, Mahkamah ini juga mendapati bahawa R1 telah gagal mempertimbangkan prinsip 'procedural impropriety' dalam mencapai keputusannya.
>
> [53] Alasan-alasan Mahkamah ini adalah disusul seperti berikut:
>
> Pertuduhan Pertama
>
> [55] Di dalam mencapai keputusannya bahawa pertuduhan pertama ini berjaya dibuktikan, R1 telah membuat dapatan pertamanya bahawa P telah bertindak di luar bidangkuasanya semasa mengeluarkan Dokumen Komitmen tanpa melalui saluran yang betul.
>
> [56] Seterusnya, R1 juga telah membuat dapatan bahawa Dokumen Komitmen tersebut telah meletakkan tanggungjawab yang berlebihan ke atas kakitangan dalam melaksanakan tugas sedia ada mereka serta mempersalahkan kakitangan sebagai punca kelewatan kesiapan Projek Pembentungan Langat.
>
> [57] Pada hemat Mahkamah ini, dalam membuat dapatan-dapatan di atas, R1 telah gagal mempertimbangkan keterangan yang dikemukakan semasa perbicaraan bahawa P yang merupakan Ketua Jabatan SCS bagi Projek Pembentungan Langat telah terlebih dahulu ada menghantar draf Dokumen Komitmen tersebut kepada En. Azian (Pengurus Sumber Manusia dan Pentadbiran MMC PLSB) yang bukan sahaja telah memberikan maklum balas beliau malahan telah membuat pindaan kepada draf tersebut serta telah melabelkan draf tersebut sebagai untuk tindakan segera ("immediate action"). Maka, dapatan R1 bahawa P telah bertindak di luar bidangkuasanya dan tanpa melalui saluran yang betul apabila mengarahkan Dokumen Komitmen tersebut diedarkan kepada kakitangan merupakan dapatan yang tidak kukuh atau meragukan.

[58] Dalam perkara ini juga, alasan En. Azian yang diterima oleh R1 bahawa beliau hanya bertindak menuruti kehendak P dan tidak berupaya untuk menghalang P kerana jawatan P lebih tinggi dari En. Azian juga sukar untuk diterima kerana En. Azian, selaku Pengurus Sumber Manusia dan Pentadbiran MMC PLSB boleh dan sepatutnya bertanggungjawab untuk mengambil apa-apa langkah yang perlu termasuklah merujuk isu tersebut kepada pihak pengurusan R2 untuk nasihat atau arahan sewajarnya. Lebih-lebih lagi, adalah fakta yang tidak dipertikaikan bahawa tujuan Dokumen Komitmen disediakan adalah untuk kepentingan dan faedah MMC PLSB dan R2 bagi menyiapkan Projek Pembetungan Langat. Jika pun kaedah (method) yang digunakan oleh P tidak dipersetujui, Mahkamah ini percaya En. Azian boleh memainkan peranannya untuk membantu objektif P untuk meningkatkan komitmen kakitangan bagi tujuan menyiapkan Projek Pembetungan Langat itu sendiri.

[59] Selain itu, Mahkamah ini juga mendapat R1 telah gagal mengambil kira akan kesan keterangan P bahawa beliau terlebih dahulu ada mengeluarkan satu emel kepada En. Azian sebelum sesi townhall berlangsung yang berbunyi "the extension of year contract (until October 2019) shall apply to those who have signed with the agreement on the commitment but to those with disagreement shall be on KIV. I will discuss with En Fatah on our action plan for those on KIV once I am back to office".

[60] Dalam perkara ini juga, Mahkamah ini juga mendapati bahawa R1 telah gagal mengambil pertimbangan keterangan sebaliknya, iaitu semasa sesi townhall ianya merupakan kenyataan En. Azian sendiri kepada kakitangan yang hadir bahawa ada kemungkinan kontrak kakitangan tetap yang tidak bersetuju dengan Dokumen Komitmen tidak akan dilanjutkan perkhidmatan mereka selepas kontrak mereka tamat. Kenyataan En. Azian yang sedemikian jelas sekali bertentangan dengan emel P kepada En. Azian sebelum itu.

[61] Oleh yang demikian, keterangan sedia ada menunjukkan dengan jelas bahawa setakat sesi townhall, apa-apa tindakan yang bakal diambil terhadap kakitangan yang enggan tandatangan Dokumen Komitmen tersebut masih belum dimuktamadkan oleh P.

[62] Seterusnya, Mahkamah ini mendapati R1 juga telah gagal mengambil pertimbangan akan fakta bahawa En. Azian semasa sesi townhall ada meminta kakitangan untuk merujuk sebarang persoalan kepada P sekembali beliau dari cutinya. Menurut dokumen-dokumen prosiding, tidak ada pula keterangan yang menunjukkan apa-apa persoalan ada ditujukan oleh kakitangan kepada P selepas sesi townhall yang diadakan. Oleh yang demikian, sekali lagi setakat sesi townhall, Mahkamah ini mendapati Dokumen Komitmen tersebut masih bersifat belum muktamad dan terbuka untuk dibincangkan di antara kakitangan tetap operasi SCS dan P.

[63] Selanjutnya, Mahkamah ini juga mendapati R1 telah gagal mengambil pertimbangan akan fakta bahawa pada akhirnya, tidak ada sesiapa pun di kalangan kakitangan terlibat yang menandatangani Dokumen Komitmen tersebut sama ada bersetuju atau tidak dengan Dokumen Komitmen tersebut di ruangan pilihan yang disediakan.

[64] Justeru itu, berdasarkan fakta-fakta relevan yang tidak diberikan pertimbangan sewajarnya oleh R1 seperti di atas, bagai mana mungkin R1 membuat dapatan bahawa wujudnya 'tekanan kepada pekerja dan telah menyebabkan pekerja tidak mempunyai pilihan lain selain bersetuju dengan terma-terma yang terkandung dalam dokumen tersebut bagi menjamin perkhidmatan disambung' sebagai mana intipati pertuduhan pertama?

[65] Dalam perkara ini, jika pun Dokumen Komitmen tersebut telah mewujudkan tekanan kepada kakitangan, Mahkamah ini berpandangan adalah pramatang untuk R1 mendapati bahawa P telah melakukan salah laku yang serius kerana Dokumen Komitmen tersebut masih terbuka untuk dibincangkan dan belum ditandatangani oleh kakitangan.

[66] Malahan, berdasarkan nota-nota prosiding, Mahkamah ini mendapati tidak ada keterangan yang kukuh bagi menunjukkan telah berlakunya suasana tegang di kalangan kakitangan. Yang jelas, P tidak berada semasa sesi townhall dan tidak ada keterangan menunjukkan sekembalinya beliau dari bercuti, beliau telah melakukan perkara-perkara yang boleh disifatkan sebagai memaksa kakitangan operasi dalam apa juga cara apabila mendapat tahu tidak ada sesiapa yang menandatangani Dokumen Komitmen tersebut semasa atau selepas sesi townhall tersebut diadakan.

[67] Apa yang ada, hanyalah keterangan salah seorang kakitangan terlibat yang hadir sebagai saksi perbicaraan iaitu En. Fadzilah yang menyatakan bahawa beliau dan kakitangan sebenarnya tidak ada masalah untuk meningkatkan komitmen kerja untuk kepentingan Projek Pembentungan Langat, cuma yang menjadi isu adalah mengenai kaedah yang dibuat oleh P iaitu yang meletakkan pengakuan kakitangan sebagai penyebab kelewatan, pengenaan tugas-tugas dan tanggungjawab di luar skop tugasan sedia ada dan kesan pilihan jika kakitangan tidak bersetuju dengan tugas-tugas dan tanggungjawab yang dikenakan iaitu kontrak perkhidmatan mereka mungkin tidak akan dilanjutkan selepas kontrak mereka tamat. Sekali lagi di sini, anggapan bahawa kontrak perkhidmatan kakitangan tidak akan dilanjutkan jika kakitangan tidak bersetuju jelas datangnya daripada kenyataan En. Azian semasa sesi townhall bukan P malahan turut bercanggah dengen emel P kepada En. Azian sejurus sebelum townhall dimulakan.

[68] Maka, berikutan kedudukan Dokumen Komitmen yang masih terbuka untuk perbincangan dan belum ditandatangani oleh mana-mana kakitangan setakat tarikh pertuduhan pertama dikenakan terhadap P, Mahkamah ini memutuskan bahawa dapatan R1 bahawa R2 telah berjaya membuktikan salah laku serius seperti pertuduhan pertama terhadap P jelas merupakan dapatan yang tidak munasabah dan perverse dalam konteks kes *Wednesbury* sebagai mana yang telah disentuh sebelum ini.

Pertuduhan Kedua dan Ketiga

[69] Pertuduhan kedua dan ketiga ke atas P telah dilihat secara bersekali oleh R1 dalam keputusannya.

[70] Mengenai kedua-dua pertuduhan ini, R1 didapati membuat dapatan-dapatan berikut:

> (77) Mahkamah mendapati walaupun Penuntut diberi kuasa untuk menyelia pekerjanya bagi memastikan projek berkenaan dilaksanakan mengikut jadual, Penuntut telah bertindak melebihi kuasa yang dimandatkan kepadanya. Tindakan tersebut adalah bertentangan dengan prinsip syarikat apabila Penuntut telah memberi tekanan kepada pekerja operasi untuk menandatangani Dokumen Komitmen tersebut.
>
> (78) Ini kerana walaupun terdapat pekerja-pekerja yang tidak komited dan/atau mempunyai prestasi kerja yang tidak memuaskan, langkah sewajarnya yang patut diambil oleh Penuntut adalah untuk merujuk perkara yang sama kepada Bahagian Sumber Manusia syarikat bagi membolehkan tindakan susulan diambil bagi menangani masalah tersebut.
>
> (79) Mahkamah menerima keterangan COW1 yang menyatakan bahawa tindakan Penuntut tersebut telah menyebabkan morale pekerja-pekerja FT Operations yang terlibat direndah-rendahkan dan ini boleh menyebabkan syarikat terdedah kepada pemberhentian kerja secara konstruktif oleh pekerja-pekerja FT Operations. Situasi ini boleh meletakkan syarikat dalam posisi yang tidak selamat.
>
> (80) Selanjutnya, menurut COW2, setakat 20.8.2018 dia tidak mempunyai pengetahuan berkenaan Dokumen Komitmen tersebut dan tidak pernah dirujuk atau dibincangkan dengan perkara tersebut ataupun berkenaan hasrat Penuntut untuk mengeluarkan Dokumen Komitmen tersebut kepada pekerja FT Operation.
>
> (81) COW2 menyatakan bahawa peranan Penuntut sebagai ketua SCS adalah untuk memastikan supaya Projek Pembentungan Langat dilaksanakan mengikut jadual yang ditetapkan dan untuk memastikan terdapat peningkatan terhadap pelaksanaan projek tersebut memandangkan projek tersebut telah mengalami kelewatan dan tidak mengikut jadual yang ditetapkan. COW2 menekan bahawa pada bila-bila masa Penuntut tidak pernah dinasihatkan untuk mengeluarkan Dokumen Komitmen tersebut.
>
> (82) Jelas disini, Penuntut telah bertindak di luar kuasa yang diberikan kepadanya selaku Ketua SCS.
>
> (83) COW2 menyatakan bahawa Penuntut tidak mempunyai kuasa untuk memaksa pekerja bawahannya memberi akujanji untuk mematuhi Dokumen Komitmen tersebut bagi tujuan untuk pertimbangan lanjutan atau pembaharuan kontrak mereka. Apatah lagi apabila Dokumen Komitmen disediakan dan diedarkan tanpa pengetahuan COW2.

[71] Dengan hormat, mahkamah ini berpendapat bahawa dapatan-dapatan R1 di atas adalah bercampur aduk dan tidak relevan kepada elemen salah laku di dalam pertuduhan kedua dan ketiga iaitu P telah memberikan representasi salah bahawa COO telah dirujuk dan bersetuju untuk P membuat dan mengedarkan dokumen komitmen tersebut untuk ditandatangani oleh kakitangan tetap operasi SCS (pertuduhan kedua) dan representasi salah ini telah menjejaskan reputasi COO (pertuduhan ketiga).

[72] Setelah meneliti dokumen komitmen, mahkamah ini mendapati perenggan terlibat yang mengaitkan nama COO adalah di perenggan 3 seperti berikut:

> In line with the directive given by our COO to make sure that the team should wake up and focus in or work ensuring that the Project could be completed on time or to the desired contractual completion date, the team should change our way of working by putting more effort to the. Project completion and do all necessary including to become more efficient for the benefit of the company.

[73] Pada hemat mahkamah ini, keseluruhan perenggan 3 yang dinyatakan di atas tidak mengandungi representasi salah di pihak P mengenai arahan COO supaya projek disiapkan dalam tempoh waktu yang ditetapkan. Malahan, di dalam penyata saksi COO sendiri semasa perbicaraan di hadapan R2, dinyatakan seperti berikut (rujuk soalan dan jawapan no. 10):

> The Claimant's role as Head, SCS was to ensure that the execution of the Langat Sewerage Project could be completed on time.
>
> My direction to him was to ensure that the Project progress in SCS to be improved as the delay was already too much compared to the planned schedule. I did not advise him to issue any document whatsoever such as the Commitment Declaration.

[74] Sehubungan itu, representasi yang terkandung di perenggan 3 tersebut adalah selaras dengan arahan COO kepada P yang mahukan kerja-kerja Projek Pembentangan Langat disegerakan kerana telah mengalami kelewatan yang melampau.

[75] Namun demikian, jika pun kesilapan P adalah kerana menyedia dan mengedarkan Dokumen Komitmen untuk tandatangan kakitangan operasi terlibat tanpa melalui prosedur sepatutnya dan tanpa mendapatkan persetujuan COO, Mahkamah ini berpandangan jika pun kesilapan tersebut adalah satu salah laku, namun salah laku tersebut masih belum boleh dikatakan sebagai lengkap kerana Dokumen Komitmen tersebut setakat tarikh pertuduhan masih dalam bentuk draf yang belum dimuktamadkan dan masih terbuka untuk perbincangan.

[76] Seterusnya, jika diteliti kepada dapatan-dapatan R1 seperti yang dirujuk di perenggan 64 di atas, adalah jelas bahawa R1 telah terpengaruh dengan fakta-fakta yang tidak relevan dengan pertuduhan kedua dan pertuduhan ketiga, iaitu seperti berikut:

(a) P telah memaksa dan memberi tekanan kepada kakitangan untuk mendatangani Dokumen Komitmen sedangkan tiada keterangan daripada tersebut kakitangan menunjukkan P secara sendiri telah memaksa kakitangan untuk berbuat demikian;

(b) P sepatutnya mengambil langkah susulan yang sepatutnya dengan Bahagian Sumber Manusia jika pun benar terdapat kakitangan yang kurang berprestasi sedangkan perkara tersebut masih terbuka untuk perbincangan dan masih boleh dilaksanakan oleh Bahagian Sumber Manusia R2 atau MMC PLSB;

(c) tindakan P dalam menyediakan Dokumen Komitmen tersebut telah merendah-rendahkan moral kakitangan tetap operasi SCS dan boleh mendedahkan R2 kepada pemberhentian kerja secara konstruktif oleh kakitangan terlibat sekaligus meletakkan R2 dalam posisi yang tidak selamat sedangkan Dokumen Komitmen tersebut masih belum dimuktamadkan dan belum ditandatangani oleh kakitangan dan adalah spekulatif untuk mengatakan R2 diletakkan dalam posisi yang tidak selamat atau terdedah kepada tuntutan penamatan atau pembuangan kerja oleh kakitangan; dan

(d) P tidak mempunyai kuasa untuk memaksa pekerja bawahannya memberi akujanji untuk mematuhi Dokumen Komitmen tersebut bagi tujuan untuk pertimbangan lanjutan atau pembaharuan kontrak mereka sedangkan adalah fakta yang tidak dipertikaikan bahawa pada akhirnya, kuasa untuk melanjutkan kontrak kakitangan kontrak tetap operasi SCS adalah kuasa R2 dan bukannya kuasa P.

[77] Selain itu, R1 juga didapati telah gagal untuk mempertimbangkan langsung fakta relevan iaitu surat jawapan tunjuk sebab oleh P mengenai isu kebenaran atau arahan COO yang mana P memperjelaskan seperti berikut:

> ... note that the use of COO is with no other purpose but to provide the clear picture of the company's direction and to show the teams staff on how serious all teams to handle the situation.

[78] Seterusnya, walaupun COO R2 ada menyatakan bahawa adanya kemudaratan melanda R2 akibat Dokumen Komitmen tersebut, tiada perincian atau bukti diberikan oleh beliau berkenaan hal kemudaratan yang dimaksudkan.

[79] Selanjutnya, dengan keadaan Dokumen Komitmen yang masih belum dimuktamadkan serta masih terbuka untuk perbincangan setakat tarikh pertuduhan dikenakan ke atas dan dengan ketiadaan apa-apa keterangan yang menunjukkan P sekembalinya dari cuti selepas sesi townhall telah memaksa kakitangan untuk menandatangani Dokumen Komitmen, bagaimana mungkin P boleh dikatakan sebagai memberikan representasi salah kepada pekerja-pekerja R2 seperti dinyatakan dalam pertuduhan kedua?

[80] Pada masa yang sama, tiada juga pertimbangan diberikan oleh R1 ke atas keterangan COO R2 yang bersetuju bahawa beliau berada dalam kedudukan untuk membatalkan Dokumen Komitmen tersebut tetapi memilih untuk tidak berbuat demikian atas pengataan bahawa kemudaratan telah pun melanda R2 ("damage was done") sedangkan sehingga ke hujung prosiding di hadapan R1 apa-apa kemudaratan yang dimaksudkan tidak diperjelaskan atau dibuktikan dengan sepatutnya.

[81] Reputasi COO R2 yang dikatakan terjejas juga tidak diperincikan dengan sewajarnya oleh R2 dan perkara ini tidak dipertimbangkan sepenuhnya oleh R1.

[82] Oleh yang demikian, memandangkan R1 telah terpengaruh dengan fakta-fakta tidak relevan dan gagal mengambil perimbangan fakta-fakta yang relevan, dapatan R1 bahawa pertuduhan kedua dan ketiga telah berjaya dibuktikan terhadap P pada tarikh pertuduhan kedua dan ketiga dihadapkan kepada P adalah juga tidak munasabah dan perverse dalam konteks kes *Wednesbury*.

…

[84] Oleh yang demikian, jika rekod-rekod prosiding menunjukkan terdapatnya unsur ketidak-munasabahan atau perverse dalam konteks prinsip *Wednesbury* sebagai mana yang dikesan di dalam Keputusan Award R1, maka adalah wajar untuk Mahkamah ini campur tangan dalam keputusan yang disangkal tersebut.

Kewajaran Hukuman Dalam Konteks 'Proportionality'

[86] Prinsip 'proportionality' seperti yang digunapakai di Malaysia merupakan salah satu alasan untuk semakan kehakiman.

…

[88] Dalam hal ini, Mahkamah ini mendapati R1 dalam keputusannya tidak langsung mengambil pertimbangan mengenai prinsip proportionality terhadap hukuman yang dikenakan oleh R2 terhadap P.

[89] Pertama sekali, R1 dalam keputusannya yang bersetuju dengan posisi R2 bahawa tindakan R2 menamatkan perkhidmatan P dengan cara menarik balik kontrak perkhidmatan sambungan adalah wajar berikutan R2 telah hilang kepercayaan terhadap P.

[90] Meskipun secara prinsipnya bahawa hilangnya kepercayaan seorang majikan kepada pekerjanya merupakan sesuatu yang perlu dihormati oleh Mahkamah Perusahaan, namun persoalan sebenarnya yang perlu diambil pertimbangan oleh Mahkamah Perusahaan adalah sama ada hukuman yang dikenakan adalah berkadaran dengan kesalahan yang dilakukan? Perlu diingatkan di sini, R2 dalam perkara ini telah memberhentikan perkhidmatan P dengan cara menarik balik kontrak sambungan yang sebelum itu telah dipersetujui dengan hanya memberikan notis yang sangat singkat serta tanpa memberikan apa-apa pampasan langsung kepada P.

A [91] Selain itu, Mahkamah ini juga mendapati R1 tidak langsung memberikan apa-apa perhatian kepada fakta bahawa R2 melalui keterangan saksi-saksinya mengaku bahawa Dokumen Komitmen tersebut boleh ditarik balik atau diperbetulkan oleh R2 tetapi tidak dibuat sedemikian atas alasan COO bahawa 'damage was done'. Dalam erti kata lain, ketiadaan apa-apa keterangan mengenai pilihan lain yang ada pada B R2 dalam menangani salah laku P sebagai mana dipertuduhkan telah gagal diberikan pertimbangan langsung oleh R1 dari sudut 'proportionality' hukuman yang dikenakan oleh R2 terhadap P.

[92] Ini kerana, jika pun R1 adalah betul dalam dapatannya bahawa R2 telah berjaya membuktikan pertuduhan-pertuduhan terhadap P, sama ada C hukuman yang dikenakan adalah berpatutan atau sebaliknya 'harsh' merupakan satu lagi cabang yang wajib dipertimbangan oleh R1.

[93] Pada hemat Mahkamah ini, perkara-perkara yang patut dipertimbangkan oleh R1 dalam konteks 'proportionality' hukuman ini adalah dengan mengambil kira tujuan P menyediakan Dokumen Komitmen yang jelas D selaras dengan kehendak R2 yang mengkehendaki supaya Projek Pembetungan Langat yang ketika itu berada dalam kritikal disiapkan dengan segera yang mana tidak dinafikan juga adalah di bawah tanggungjawab P. Maka, jika pun 'kaedah' yang digunakan oleh P adalah tidak dipersetujui, ia tidak boleh menidakkan fakta bahawa tidak wujud apa-apa konflik kepentingan (conflict of interest) di antara diri P dan E syarikat R2.

[94] Selanjutnya, ketiadaan keterangan jelas atau kukuh untuk menunjukkan bahawa P secara sendiri telah mengenakan tekanan kepada kakitangan operasi tetap SCS dan bahawa R2 telah mengalami kemudaratan benar (real damage) juga merupakan faktor-faktor yang F sepatutnya dipertimbangkan oleh R1 dalam menentukan 'proportionality' hukuman yang telah dikenakan oleh R2 terhadap P.

[95] Selain itu, fakta bahawa P telah diberikan penilaian 'Competent High' sebelum itu oleh R2 juga gagal diambil pertimbangan oleh R1 dalam menentukan kewajaran hukuman R2 ke atas P.

G [96] Akhir sekali, Mahkamah ini mendapati R1 langsung tidak meneliti terma-terma kontrak perkhidmatan asal P dengan R1 yang terkandung di dalam surat tawaran R1 kepada P bertarikh 30.8.2016 terutamanya berkaitan isu penamatan kerja (rujuk surat tawaran di eksibit 'MMC-1' dalam AJR2).

H [97] Melalui surat bertarikh 03.08.2022 tersebut, boleh disimpulkan bahawa terdapat dua (2) keadaan di mana perkhidmatan P boleh ditamatkan iaitu atas alasan:

(a) sekiranya P melanggar representasi-representasi yang telah diberikan kepada R2 sama ada dalam bentuk memberikan maklumat palsu atau misleading (perenggan 16); dan

I (b) sekiranya didapati salah atas tuduhan salah laku (perenggan 17).

[98] Sungguhpun demikian, Mahkamah ini mendapati perkara-perkara salah laku yang diperincikan di dalam perenggan 17 surat tersebut tidak mempunyai perkaitan secara langsung (direct nexus) dengan pertuduhan-pertuduhan yang dirangka terhadap P. Dalam hal ini, sekiranya pun perenggan 17 ada menyebut bahawa perlanggaran polisi syarikat merupakan salah satu salah laku, namun R1 tidak mengemukakan semasa perbicaraan apakah polisi-polisi syarikat yang berkuatkuasa pada masa pertuduhan dikenakan terhadap P.

[99] Selain itu, hanya perbuatan yang menjejaskan reputasi R2 sebagai sebuah syarikat atau MMC Group secara keseluruhan sahaja yang disebut sebagai salah laku yang membolehkan penamatan dibuat secara summarily dan bukannya perbuatan yang menyebabkan reputasi COO menjadi terjejas sebagai mana pertuduhan ketiga yang dirangka.

[100] Jika surat tawaran R1 kepada P bertarikh 30.8.2016 diteliti, tidak ada disebut bahawa 'hilang kepercayaan' merupakan satu salah laku yang membolehkan penamatan perkhidmatan dibuat oleh R2 ke atas P secara 'summarily' sebagai mana yang dilakukan oleh R1 terhadap P dalam perkara ini.

[101] Sehubungan dengan itu, kegagalan R1 memberikan perhatian kepada perkara-perkara berkaitan 'proportionality' seperti yang disebut di atas telah menyebabkan keputusan yang disangkal tersebut sebagai 'irrational' dan wajar untuk diganggu oleh Mahkamah ini.

Perlanggaran Rukun Keadilan Asasi

[102] Pemohon dalam semakan kehakiman di sini ada membangkitkan isu bahawa kegagalan R1 menubuhkan Disciplinary Inquiry sebagai salah satu asas untuk Mahkamah ini membatalkan keputusan yang disangkal atas prinsip perlanggaran rukun keadilan asasi.

[103] Mahkamah ini bersetuju dengan hujahan peguam R2 bahawa adalah undang-undang mantap bahawa kegagalan majikan menjalankan Inkuiri Disiplin terhadap pekerja tidak menjadikan keputusan majikan tersebut sebagai tidak sah.

[104] Namun demikian, Mahkamah ini mengesan terdapatnya unsur perlanggaran rukun keadilan asasi telah dilakukan di pihak R2 apabila saksi R1 bernama Noorazam Abas (Head, Group Human Resource) mengakui bahawa beliau bersama-sama COO yang membuat keputusan untuk menarik balik kontrak sambungan P.

[105] Berdasarkan keterangan ini, Mahkamah ini mendapati bahawa R1 langsung tidak memberikan perhatian sama ada keterangan ini menjadikan tindakan R2 menamatkan kontrak sambungan sebagai hukuman ke atas P tercemar dengan 'procedural impropriety' atau secara khususnya telah melanggar prinsip *nemo judex causa sua* (seseorang tidak boleh menjadi pengadil dalam kenya sendiri) sebagai salah satu cabang fundamental prinsip natural justice.

A [106] Pada pandangan Mahkamah ini, memandangkan pertuduhan kedua dan ketiga secara khususnya melibatkan COO, maka adalah amat tidak adil untuk COO juga sama ada secara bersendirian atau bersesama dengan yang lain untuk mengadili kes salah laku P dalam perkara ini. Dalam keadaan ini, Mahkamah ini berpandangan terdapat wujud elemen bias di pihak COO yang sekaligus mencacatkan tindakan R2 dalam
B menamatkan perkhidmatan P.

[107] Maka dengan itu, Mahkamah ini mendapati keputusan R1 juga adalah tidak munasabah atau perverse apabila gagal mempertimbangkan wujudnya perlanggaran rukun keadilan asasi di pihak R2 dalam keputusannya menamatkan perkhidmatan P.

C Kesimpulan

[108] Berdasarkan alasan-alasan yang dinyatakan di atas, Mahkamah ini berpuashati untuk membenarkan permohonan semakan kehakiman yang dfailkan oleh P untuk satu perintah *certiorari* dikeluarkan bagi membatalkan keputusan Award R1 bertarikh 01.08.2022.

D [109] Selanjutnya, Mahkamah ini juga memerintahkan supaya perkara tuntutan P terhadap R2 ini dikembalikan di hadapan R1 untuk awad pampasan atau relif sewajarnya diberikan kepada P selaras dengan bidangkuasa R1 di bawah s.30 IRA berikutan penamatan perkhidmatan P yang Mahkamah ini dapati dibuat tanpa sebab dan alasan yang wajar.

E [110] Akhir sekali, Mahkamah ini menetapkan kos sebanyak RM5,000.00 dibayar kepada P oleh R2 tertakluk kepada fi alokatur.

Our Decision

Judicial Review – The Law

F **[32]** It is trite that the decision of the Industrial Court (the award) may be reviewed by the High Court for both process and substance on the grounds of "illegality", "irrationality" and "procedural impropriety". In this regard, the Federal Court in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147 through a majority decision delivered by Eusoff Chin CJ
G (as he then was) had held as follows:

> It is often said that judicial review is concerned not with the decision but the decision-making process. See, *eg*, *Chief Constable of North Wales v. Evans* [1982] 1 WLR 1155. This proposition, at full face value, may well convey the impression that the jurisdiction of the Courts in judicial review
> H proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety. But, Lord Diplock's other grounds for impugning a decision susceptible to judicial
> I review makes it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the Courts to scrutinise such decisions not only for process, but also for substance.

[33] Another ground for review is if the decision made by the tribunal is unreasonable as what had been decided. In the case of *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 CLJ 748, the Court of Appeal through the judgment delivered by Gopal Sri Ram JCA (as he then was) held as follows:

> In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision-making authority, whether exercising a *quasi*-judicial function or purely an administrative function has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded where resort is had to an unfair procedure (see *Raja Abdul Malek v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.

[34] This appeal hinges on two main issues for this court's determination, which are:

(i) dismissal was wrongful, unlawful and legally invalid; and

(ii) premature dismissal.

[35] Learned counsel for the respondent argued that both the issues were not made out for the following reasons:

(i) the three allegations advanced by the appellant are vague, unclear, and unsupported by cogent evidence, and dismissal of the respondent was premature;

(ii) there was no evidence that the respondent committed such misconduct in issuing the "commitment document";

(iii) there was no evidence that the respondent had damaged the company's reputation or its employees; and

(iv) there is no single act by the respondent that could be construed as causing damage to the COO's reputation.

[36] On the other hand, learned counsel for the appellant strenuously contended that the respondent's conduct constituted grave misconduct warranting dismissal, based, among others, as follows:

(i) the commitment document was the respondent's own document and not a document issued by Human Resources;

(ii) the respondent did not have the authority to compel the subordinate operational staff to provide an undertaking as in the commitment declaration for them to be considered for an extension or renewal of their respective fixed-term contracts;

(iii) the contention that the matter is premature, as no staff had signed the commitment declaration, is misconceived; and

(iv) the respondent's act of issuing the commitment declaration without any authority or consent from management and further misusing the COO's position to justify his actions amounted to grave misconduct and exposed the appellant to the risk of industrial disharmony and reputational damage.

[37] Having examined and scrutinised the notes of proceedings and the oral and written submissions made by both parties, we find no appealable error in the findings of the learned High Court Judge in overturning the decision of the Industrial Court. From the facts and evidence gathered, we conclude as follows.

[38] We find no evidence adduced at the trial that the act of the respondent in issuing the commitment document caused damage to the COO's reputation. Even the COO himself could not prove that the respondent had caused damage and affect his reputation.

[39] As for the COO's evidence, apart from merely denying the knowledge of the existence of the commitment document, the COO agreed "that the company could cancel the issuance of the "commitment document" but damage has been done". However, he could not specify what kind of damage had occurred, especially when no employee had signed it.

[40] The commitment document was merely a draft which was not finalised. The draft was referred to by the respondent to the Human Resources Manager (En Azian/COW5) who then reviewed, approved and emailed it back to the respondent "for immediate action".

[41] It is an undisputed fact that the commitment document was already within the knowledge of Human Resources Department and Azian as the Head. In preparing and drafting the said document, the respondent had also consulted and had received feedback from Zulkarnain bin Yaakub, the Deputy Project Director of MMC Pembetungan Langat Sdn Bhd. In short, it was openly done by the respondent and not secretly done by him.

[42] The respondent never, on his own accord, silently issued and passed the commitment document to the employees and forced them to sign without anyone's knowledge. We agree that if this was done quietly then the pressure on the employee is there. However, there was no single piece evidence to prove that the respondent had personally pressured the employees nor was the draft commitment document distributed directly to the employees. This is evidence from the facts that no employee has signed the draft commitment document. Hence, the allegation that the respondent's conduct in issuing the commitment document had exposed the appellant to the risk of industrial disharmony and reputational damage and eroded employees' confidence in the organisation is merely a bare assertion without any foundation having been established.

[43] On the facts here, we agree with the learned judge of the High Court who opined that the drafting of the commitment document was solely aimed at improving company's performance and the necessity for the timely completion of the project.

[44] However, learned counsel for the appellant argued that the High Court's flawed reasoning sets a dangerous precedent of allowing an employee to abuse his authority yet avoid liability merely because his attempt was unsuccessful or incomplete and that purported good intentions cannot be used as a shield and the respondent had overstepped his authority and interfered in what was basically a purview of human resources and also failed to get management approval to execute his plan.

[45] From the evidence, it shows that the COO was one of the witnesses before the Industrial Court. He gave evidence that as of 20 August 2018, he was not aware of the commitment declaration and that at no time was there any discussion or consultation by the respondent on his intention on issuing such a commitment declaration. The COO further testified, "I did not advise him to issue any document whatsoever such as the commitment declaration".

[46] It was also in evidence before the Industrial Court that the respondent had no authority or jurisdiction to draft and issue any 'commitment declaration', as matters concerning staff commitment properly fell within the purview of the Human Resources Department, which is responsible for managing staff performance and discipline. Here, the respondent has also sincerely admitted to this fact where the respondent in his reply to the letter of show cause, had written as follows:

> note that the use of 'COO' is with no other purpose but to provide the clear picture of the company's direction and to show the teams staff on how serious all teams to handle the situation.

And then at the next paragraph he said as follows:

> "unless the COO himself has no intention to make sure the projects under him to be completed under a timely manner and do not want to implement the project as per the standard project management practices

A which I have great doubt on these subjects and should have no element of misrepresentation in this case" and also, "based on my personal experience I have also seen many times in many construction companies, that their top management have advised to quote their name for the seek of getting the job done and it was proven based on the success of the projects."

B

[47] Further, during the proceedings before the Industrial Court, the respondent also admitted that:

"Bukan arahan COO untuk keluarkan letter macam ini", and, "Setahu saya, saya memang tak ada otoriti untuk arahkan staf membuat akujanji tersebut."

C

[48] In our view, the issuance of the "commitment document" does not render the respondent's action misconduct, since the document was not even finalised and the COO even agreed "that the company could cancel the issuance of the "commitment document". Hence, why has such a harsh

D punishment been imposed by the appellant when the respondent's main aim was solely to improve the company's performance?

[49] The respondent had acted *bona fide* in the performance of his duties. The issuance of the "commitment document" even if ill-advised or mistaken, to our mind cannot amount to misconduct especially when it is not

E demonstrated to us that the respondent had acted recklessly or dishonestly or for his own self-interest. Furthermore, it needs to be emphasised that the "commitment document" contained no malicious elements or intent, nor did the appellant provide any evidence to prove such intent. Taking the content of the "commitment document" as a whole, we are of the view that the

F content in the "commitment document" were in line with the COO's expectations and the respondent's duties.

[50] It is also pertinent to emphasise that the distribution of the "commitment document" to the FT Operations employees took place while the respondent was on leave. Without his presence during the townhall

G sessions, how could the appellant have alleged that the act of the respondent had struck at the core of the employer-employee relationship and undermined the appellant's reputation. Such an assertion made against the respondent is in fact not supported at all by the evidence and is, with respect, untenable.

H **[51]** Accordingly we are unanimous in our views that the appellant's case, even if taken at its highest, amounts only to an error of judgment and is not a case of misconduct. The punishment of dismissal for such a good-faith administrative lapse is wholly disproportionate. This is more so when the allegation of the destruction of trust and confidence to the management said

I to have resulted from the "commitment document" has not been proven at all.

Conclusion

[52] In all circumstances, we find that the Industrial Court award in respect of the appellant was tainted with error of law and the learned High Court Judge was correct in allowing the judicial review and quashing the award. Consequently, for the reasons as stated above, the appeal in encl. 22 is dismissed with costs of RM20,000 (subject to allocator).